EQUITY CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH-CAROLINA.

DECEMBER TERM, 1828.

James Grant
v.
Edward Pride. } From Halifax.

Commissions to executors are not a right attached to the office, but are an allowance for their trouble and risk in settling the estate:—therefore, where there was two executors, and one took upon himself more than half the trouble and risk, it was held, he was entitled to more than a moiety of the commissions.

The case made by the bill, answer and proofs in this cause was that the Plaintiff and Defendant were executors of one *Redding Jones*; that the Plaintiff resided in Halifax County, and the Defendant in Wake, near the residence of their testator; that most of the business connected with the estate of *Jones*, was performed by the Defendant, although the Plaintiff gave all the aid in his power; that the sum of $692 67 was allowed the Plaintiff and Defendant for commissions; and that the Defendant, having all the funds in his hands, had refused to allow the Plaintiff any part thereof. The prayer of the bill was that the Defendant might pay to the Plaintiff, one-half of the sum allowed for commissions.

The case was submitted without argument by *Seawell* for the Plaintiff, and *Badger* for the Defendant.

HALL Judge—The office of executor or administrator does not *per se* draw commissions after it as a mat-

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ter of course. They are allowed for services rendered in liquidating and settling estates. Therefore if one executor performs more labor, and renders more service than another, he is entitled to a greater share of commissions.

In the present case, it appears that the Defendant rendered all necessary services in adjusting and settling the estate of the testator; that the Plaintiff did attend at some few public meetings; but the amount of service rendered by him has not been made to appear. He lived at a considerable distance; the Defendant lived very near the estate, kept all the papers, transacted the business with all concerned, and finally settled it, and held on upon the commissions.

It is unnecessary to refer the case to the master, because it is confined to a narrow compass. I am authorised to say, that a decree may be entered for one-sixth part of the commissions allowed to the Defendant, and that each party pay their own costs.

PER CURIAM.—Let a decree be entered accordingly.

Elizabeth Jourdan et al.
v.
Simon Green et al.
} From Franklin.

The word *Heirs*, in a will, where the testator recognizes the existence of the ancestor, means *heirs apparent*. In a bequest to J P and the heirs of S J, J P takes a moiety.

In such a bequest to heirs, if it be of a present interest, those only take who were born at the date of the will, and perhaps at the death of the testator. But if the interest is expectant upon a life estate, those take who are born before the expiration of the particular estate.

BURWELL PERRY on the 10th of July, 1813, made and published his will, which as far as is material to this case, is as follows:

"I give and bequeath unto my wife *Elizabeth Perry*, "one negro man named *Simon*, and one named *Peter*, "and a woman named *Suky*, together with the balance "of my stock, and household and kitchen furniture, that "is left after paying my just debts, to her during her "natural life, and after her death to be equally divided "between my son *John*, and my daughter *Sally Jourdan's* "heirs.

"I have already given to my daughter *Sally Jourdan*, "one negro boy *Bob*. I also give and bequeath to my "daughter *Sally Jourdan's* heirs, a negro boy named "*Adam*, and a negro girl named *Sylla*."

The bill was filed by the Plaintiffs who are the children of *Sally Jourdan*, born before the death of the testator *Burwell Perry*. It averred the death of the widow *Elizabeth Perry*, and the Plaintiffs insisted that they were entitled to an equal share with *John*, *per capita*, of the negroes *Simon*, *Peter* and *Suky*, and her increase.

The Defendants who were the children of *Sally Jourdan*, born after the death of the testator, and the assignees of *John* the son, admitted the facts set forth in the bill, and submitted to such construction as the Court might put upon the will.

The case was submitted without argument, by *W. H. Haywood*, for the Plaintiffs. No Counsel appeared for the Defendants.

HENDERSON, Judge.—The words "heirs of *Sally Jourdan*" in this case, mean heirs apparent—next of kin apparent, as the testator in his will takes notice that she is alive, by declaring that he had given her negro *Bob*.

The bequest of negro *Adam* and *Sylla* importing a present interest, none of the children of *Sally* can take, but those born at the time of making the will; at furthest, only those born at the testator's death, and in this

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case it makes no difference which period of time is taken, for none were born in the interval.

As to the property bequeathed to *Sally's* heirs, after the death of his wife, as there was no present interest bequeathed, those take who were born before the wife's death. It is sufficient if they answer the description, when an interest vests in possession. This rule was adopted by the old Supreme Court, in the construction of the will of one *Rogers*. If we could, we would give the property to all *Sally's* children, no matter when born, but we cannot depart so far from the words of the will.

We shall declare that *Betsey*, *John*, *Burwell*, *Perry*, *Eliza* & *Martha*, (those born before the testator's death) are entitled equally to the negro boy *Adam*, the negro girl *Sylla* and her increase, with their hire and profits; and that they with *Samuel*, *James*, *Sally* and *Martha*, being all the children of *Sally Jourdan*, born at the death of the testator's wife, are entitled equally to one half the negroes and other property, bequeathed to *Sally Jourdan's* heirs, after the death of the testator's wife, including the increase of the females since that time, and the hire, profits and interest. The other half of that property belongs to the testator's son *John*; for all the children, that is all the heirs, take as one person *quoad John*. When his share is to be ascertained, the word "*heirs*" is *nomen collectivum*.

PER CURIAM.—Let the decree be entered accordingly.

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John Barnes
v.
Turner Dickinson, } From Wayne.

Where a party had an adequate legal remedy, and has brought an action and failed in it, he has no right to the aid of a Court of Equity.

The allegations of the bill were, that the Plaintiff in the year 1810, bought of one *Robert Fellow* a negro woman, who continued in his possession for many years, during which time she had several children; that in the year 1821, the Defendant privately procured the slave and her children, to leave the premises of the Plaintiff, and took them into his possession. The bill then set forth the title under which the Defendant claimed the slaves, which was shortly this—that one *Matthew Turner* had held them as the bailee of one *Wally Turner*, on whose estate the Defendant had taken out letters of administration.

The bill then charged that the Plaintiff had brought an action of detinue against the Defendant, in which he had failed. (*Vide North-Carolina Law Cases*, 346.)—The bill prayed an injunction and general relief.

Upon the motion of the Defendant, his honor Judge *Martin* on the last Circuit, dismissed the bill for want of equity—whereupon, the Plaintiff appealed.

The case was submitted without argument by *Gaston* for the Plaintiff, and by *Badger* and *W. H. Haywood* for the Defendant.

Henderson, Judge.—I cannot perceive upon what grounds this bill can be sustained. If the Plaintiff has any title, it is a legal one, unmixed with any principle of Equity, and not beyond the reach of ordinary tribunals to afford relief. He has had a trial at law upon the merits, and has failed.

Per Curiam.—Let the decree made in the Court below be affirmed, with costs.

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Rosamond Taylor
v.
John Vick et al.
} From Nash.

Where a son who died intestate, unmarried and without issue, is bound by his agreement to support his mother, it was held, that she having succeeded to his personal estate absolutely, and to his real estate for life, had no claim against the heirs on account of their interest in the land, expectant upon her life estate, notwithstanding she had advanced the money for the purchase of that land.

The Plaintiff in her bill alleged, that she was the mother of *Samuel Winstead*; that *S. W.* purchased a valuable tract of land, at the price of $2260, but being unable to make payment for it, he applied to the Plaintiff for aid; that *S. W.* being the Plaintiff's only child, she, with the view of aiding him in making payment for the land he had bought, gave up to him six slaves, valued at $1800; that in consideration of the surrender by the Plaintiff of the negroes, *S. W.* promised to support and maintain her during her life; that afterwards *S. W.* for his own convenience, and to aid in making payment for the land bought by him, sold the dower of the Plaintiff in the real estate of her last husband, *Drury Taylor*, for the sum of $300, and applied to the Plaintiff to execute a deed to the purchaser, which she refused, unless *S. W.* would agree to convey to her the land which he had bought, and to which he assented; that *S. W.* died intestate, unmarried and without issue, and without having in any respect complied with his engagements to the Plaintiff, to convey to her the land bought by him. The prayer was for a specific performance of the agreement to convey the land.

The Defendants, who were the heirs of *Samuel Winstead*, denied the agreement set forth in the bill; relied upon the act of 1819, concerning parol contracts for the sale of lands; and insisted that the Plaintiff having succeeded to all the personal estate of their ancestor, which

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was large and valuable, and being entitled to a life estate in his land, had no claim whatever, to a support out of the assets which descended to them.

Replications were filed to the answer, and it was heard upon the proofs taken, which it is not necessary to set forth.

Devereux for the Plaintiff.

Badger for the Defendants.

HENDERSON, Judge.—The Plaintiff, however much to be pitied, for in justice she is entitled to the whole estate of her son, real as well as personal, in preference to a remote collateral heir, and the more especially in this case, as she furnished most of the funds with which the lands were purchased, yet has no grounds on which she can stand. For we are clearly of opinion, that the promise of support satisfied the transfer of the slaves; and if it did not, she has the whole personal estate as her own, wherewith she may satisfy it. At least that forms no ground of relief in this bill. And as to the agreement to convey to her the lands in question, in consideration of her selling for the son's benefit, her dower in her late husband's lands, we are well satisfied, from the testimony, that nothing more was intended than a life estate, a home for life; and that also she has got, for on her son's death without issue, and without brother, sister or father, the lands descended on her for life.

PER CURIAM.—Let the bill be dismissed with costs.

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Hugh McAuley & William Beard
v.
Robert Wilson, Executor of William Henderson.

John Henderson and others
v.
Robert Wilson, Executor of William Henderson.

} From Mecklenburg.

The doctrine of execution *cy pres* does not prevail in this state, and if the intention of a testator cannot be literally fulfilled, a trust results for the heir, or next of kin.

Where a testator bequeathed property in trust, for the support of a Minister of the Associate Seceding Party, "who shall preach at the Seceding Congregation Meeting House, called Gilead," and a majority of that Congregation being of a different denomination, refused to permit a Minister of the Associate Seceding Party, to officiate in their Church. It was held that a trust resulted, although the Associate Seceding Party offered to build another Church near the one mentioned by the testator.

The Plaintiffs *McAuley* and *Beard*, as "Trustees of the Congregation of Gilead," filed their bill, in which they averred that *William Henderson*, in company with several other persons, in the year 1791, erected a Meeting House at the place described by him in his will, hereinafter set forth; that the land upon which the Church was built, was conveyed to *William Henderson* and others, in trust for the members of the *Associate Reformed Synod*, belonging to the Presbyterian Congregation of Gilead. That some time after the erection of the Meeting House, *Henderson* and others, who had contributed to build it, separated from the communion of the Associate Reformed Synod, and became members of a religious society called the Associate Seceding Presbyterians. That after this separation, the Congregation of Gilead became divided into two societies, one called the Associate Seceders, and the other the Associate Reformed Seceders. That as the Meeting House was built at the joint expense of

both these denominations, it was agreed between them that each might use it for the purpose of public worship. —That *Henderson* duly made and published his last will, and appointed the Defendant *Wilson* his executor, who proved the same. That thereby, among other things, he devised as follows:

"The tract of land that I now live on, lying on the Catawba River, containing three hundred acres, and also fisheries, its my will and pleasure that my executors hereafter named, do within six months after my decease, cause the aforesaid tract of land to be sold to the highest bidder, (he then directs the notice of the sale, and the terms, and the security to be taken) and my will is, that the money accruing from the sale of the land, shall be laid out in purchasing shares in the State Bank of North-Carolina, or purchasing shares in the United States Bank, and the profits to go towards paying a Minister of the Gospel who shall preach at the Seceding Congregation Meeting House, called Gilead, in said county, on the great road leading from Charlotte to Beattie's Ford, *the party called the Associate Seceding Party.*"

—That the Plaintiffs had been duly elected trustees of the *Associate Receding Congregation*, who they contended were entitled to the use and occupation of Gilead Meeting House, equally with the Associate Reformed. But if in this they were mistaken, they stated that they had procured a conveyance to them, as Trustees of the Associate Seceding Congregation of Gilead, of one acre of land, and were about to erect upon it a house for the use of that congregation, within six poles of the Meeting House described by the devisor in his will.

The prayer of the bill was for an account, and that the charity created by the will might be established, and the interest of the fund be paid to the Plaintiffs to support a Minister to preach in the old Meeting House, or that the trusts of the will might be executed, *cy pres*, by appropriating the interest of the fund to the support of a Minister to preach in the new Meeting House.

The Plaintiffs *John Henderson* and others, were the heirs at law and next of kin to *William Henderson*. In their bill they set forth the above clause of their ancestor's will.

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They averred that the land on which the Meeting House at Gilead was built, belonged to the *Associate Reformed Presbyterians*. That the *Associate Seceding Presbyterians* did not exist as a body at Gilead, and had no right to the use of the house. They insisted that there was no possibility of carrying the devise into effect, and prayed for an account of the trust fund, and that the executors might be directed to pay it over to them.

The Defendant, the executor of *William Henderson*, in his answers, admittted a sale of the land mentioned in the will, for the sum of 7440 dollars, rendered an account, and submitted to any decree, by which he would be indemnified and protected.

Replications were filed, and testimony taken, explanatory of the differences between the Associate Seceding and the Associate Reformed Churches, and of the separate existence of both.—Attached to one of the depositions was an exhibit in these words:

"Gilead Church, July, 1823.

"At a meeting of this Society, agreeably to public notice given for that purpose, Resolved that this Church be newly roofed and securely inclosed, with iron fastenings to the windows, doors, &c. and that this Church or Meeting House be kept for the sole and exclusive use of this congregation and our present Pastor, or some Minister of the Associate Reformed Synod. And that our present session or Elders are authorised and required to have the sole direction of this business."

The cause was argued at June Term, 1827, by *Gaston* for the Plaintiffs *McAuley* and *Beard*; *Wilson* and *Badger* for the heirs, and *Seawell* for the Executor.

CUR. VULT ADV.

HENDERSON, Judge.—This is not a devise to a religious congregation, within either the words or the spirit of the act of 1796, (*Rev. ch.* 457.) The property is not given to the congregation, to be used by them as they may think proper, for their use and benefit; but it is given for a special purpose, in which to be sure, they

are interested, but are not the owners, to-wit, to pay a preacher of a certain sect, to preach to the congregation called Gilead. They take therefore as trustees, or *cestui que trusts*, (which is matter of indifference, the objection not being to the form) for a specific purpose, and are bound to apply the funds to that, and to no other use.

The validity of the devise depends on the question, whether the devisees are accountable to any one, for the due execution of the trust; for if they are not, it is void, and there is a resulting trust for the heirs at law, or next of kin. If there is any one who can compel the due execution of the trust, that is, the proper application of the trust fund, according to the directions of the devisor, then it is a valid trust, at least so much of it as is necessary to answer the intent of the founder. If there be more than is necessary for that purpose, the excess results to the heirs at law, or next of kin. For we do not, as they do in England, apply it to other objects of a similar kind, by what is called the doctrine of *cy pres*.

We are relieved from the consideration of the question, whether there is in this case, any persom competent to enforce the due execution of the trust; for we think that those for whose benefit it was intended, have refused, and still refuse, to accept the testator's bounty.— We certainly cannot impose it on them, for the congregation have the right to employ their own preacher, and to pay him in their own way. The testator has left us no guide to ascertain what is to be done in such an event. Nor do we know, but from conjecture, whether as the congregation, who have the appointment of the Minister and the control over the Church at Gilead, have refused to accept his bounty, it was his desire that it should be given to a part of the congregation who accord with him in religious sentiments, and who are willing to build another Church *near to the Church at Gilead*, and employ the funds in paying a preacher of that sect, directed by the testator. It is very probable that the testator would

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have directed this, had he foreseen the refusal, as the thing next best to that which he most wished. *But he has not said so*, and it is out of the power of this Court to speak for him. We cannot dispose of the property of the decease by undertaking to conjecture what would have been his will, provided he had foreseen what has since happened, which has thwarted his intent as expressed. If I was left to *conjecture*, I would say such was his will, but my argument to prove it would result in nothing like certainty. It would be this, that as the thing offered to be substituted, bears a very strong resemblance to that directed, which cannot be performed, it is probable he would have accepted the substitute, because it comes near to the thing directed. But it may be, that every circumstance in which the proposed substitute, differs from the original directed, may have been the testator's sole object in making the bequest, viz. a wish to have a preacher of his tenets to preach to the whole congregation at Gilead, and thereby bring them over to his faith, and prevent the dissemination, in that Church of what he deemed unsound doctrines. I do not say that most probably this was his intent; it is sufficient if it *may* have been, or any thing else but the precise proposition made by the Plaintiffs. If I were left to my own conjectures, I would say that in the events which have happened, the proposition made by the Plaintiffs is the thing which he would have directed; for it is fair to presume that his object was the dissemination of the doctrines of his faith; that he selected the Church at Gilead as the place of preaching, and the congregation there as the one to be preached to; but that they were pointed out only as the means of effecting the end. But if these means failed, the end was not to be lost, but the next best means, and those bearing the strongest resemblance to those pointed out, should be resorted to. This reasoning is all fair, and if we were correct in the object, would be satisfactory ground for a decree in favor

of the Plaintiffs. But when we recollect that we assume the object which he had in view, that it is incapable of proof, for he who only can speak in regard to it has spoken for the last time, by this his last will, to which only we can look for his intent, and on this subject that he is silent, we must remain in ignorance of his intent further than he has declared it, and this furnishes only ground of conjecture, on which we cannot act.

Hall Judge.—It would seem, that the object of the testator was to reconcile and unite in principle, the two sects, one of which was called "the associate seceding party," the other "the associate reformed party." To the first party the testator belonged; the Church of Gilead belonged to the latter. The testator directs that his property shall be formed into a fund to pay a Preacher of his own religious principles, to preach at the Church of Gilead. That Church have rejected any benefit that intended for them by that devise; they will not accept of it. The testator's own party, the associate seceding Presbyterians, pray the benefit of it, and that it may be vested, *cy pres*, in a Church erected by them very near to the Church of Gilead. This we think cannot be done; as the object of the testator cannot be effected, we cannot direct the fund to be applied to any other.

Per Curiam.—Let the bill of the Plaintiffs, *McAuley* and *Beard*, be dismissed, and on the bill of the heirs at law and next of kin, let an account be taken, and let all costs be paid out of the fund.

MEMORANDA.

At a meeting of the Executive Council, called on the 30th day of July last, for the purpose of filling the vacancy in the office of Attorney-General, caused by the death of *James F. Taylor, Esq. Robert H. Jones, Esq.* of Warrenton, was appointed *ad interim*, and at the last session of the General Assembly, *Romulus M. Sanders, Esq.* of Salisbury, was elected to that office.

On account of his severe indisposition, Chief-Justice TAYLOR, was prevented from filing any opinions in the causes decided at this term.